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**SUPREME COURT OF KENTUCKY
2010-SC-000326-DG
2011-SC-00508-DG**

COMMONWEALTH OF KENTUCKY

APPELLANT/CROSS-APPELLEE

V.

ON REVIEW FROM COURT OF APPEAL
NOS. 2007-CA-01264 AND 2008-CA-002376
LOGAN CIRCUIT COURT NO. 00-CR-00126

JAMES W. STEADMAN

CROSS-APPELLANT/APPELLEE

**BRIEF FOR CROSS-APPELLANT/APPELLEE
JAMES W. STEADMAN**

Submitted by,



KYLE A. BURDEN

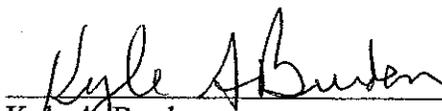
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CERTIFICATION OF SERVICE

I hereby certify that the record on appeal has been returned to the Clerk of the Court and that a copy of Brief for the Cross-Appellant/Appellee has been re-mailed this 11th day of April 2012, to Hon. Tyler Gill, Judge Logan Circuit Court, Courthouse, 200 West 4th Street, P.O. Box 667, Russellville, Kentucky 42276-0667, and to Assistant Attorney General, Office of Criminal Appeals, Office of the Attorney General 1024 Capital Center Drive, Frankfort, Kentucky 40601.



Kyle A. Burden

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INTRODUCTION

This is a criminal case wherein the Cross-Appellant/Appellee filed a CR 60.02 after discovering the Commonwealth had in its possession exculpatory evidence that it had repeatedly denied having in its possession for seven years, the CR 60.02 was denied with no hearing being conducted. A CR 59.05 was filed which was denied, the Court of Appeals dismissed the subsequent Appeal based upon the untimeliness of the filing of the CR 59.05. It is the dismissal of his Appeal, for being untimely filed, that he seeks to have vacated and remanded.

STATEMENT CONCERNING ORAL ARGUMENT

The Cross-Appellant/Appellee requests oral arguments be heard.

STANDARD OF REVIEW

The trial judge's findings of fact will only be overturned if clearly erroneous. Finally, the Appellate Court must conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. Drake v. Commonwealth, 222 S.W. 3D 254, 256 (Ky. App. 2007).

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ARGUMENTS

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ARGUMENTS

I. HUDDLESTON HOLDS THAT THE DATE THE CR 59.05 IS MAILED IT IS DEEMED SERVED.

The Commonwealth sought to have the Movant's appeal, addressing Steadman's CR 60.02/CR 59.05, dismissed on the grounds of untimeliness of the filing of the notice of appeal based upon the untimeliness of the filing of the CR 59.05. The theory promulgated by the Commonwealth was that Steadman's CR 59.05 was untimely and that the subsequent motions and eventual Notice of Appeal should have been based upon the denial of the CR 60.02 date rather than the CR 59.05 and the appropriate motions filed thereafter. The Court of Appeals, in its Opinion dismissed Mr. Steadman's second appeal as untimely. This ruling is incorrect. One must bear in mind Mr. Steadman was an indigent inmate with the Kentucky Department of Corrections in the Nursing Care Facility at the time of the filing of his CR 59.05 motion and was incapable of personally clocking and dropping his Motion at the Courthouse. Mr. Steadman was wholly reliant upon the Department of Corrections for the postage and mailing of his CR 59.05 as he had no access to the general population mailbox and was indigent. Steadman's CR 59.05 Motion was served and mailed before or on Friday, August 1, 2008, it was received and filed on Monday, August 4, 2008 at 2:34 p.m. by the Logan Circuit Court Clerk.

~~The CR 59.05 Motion was filed on or before August 1, 2008, as the Department of Corrections does not~~
perform mail services on weekends or holidays. To establish such, Steadman attaches a copy of the Kentucky Corrections Policies and Procedures, Policy 16.2 Inmate Correspondence as Exhibit Six. The Motion was deemed served at the time it was delivered to the jailers as they were the only mail handlers. "The requirements for timeliness of a motion for new trial under CR 59.02, and to alter, amend, or vacate a judgment under CR 59.05, is [sic] that they be *served* not later than ten days from the entry of the final judgment." (Emphasis added). Huddleston v. Murlev, 757 S.W.2d 216, 217 (Ky. App. 1988). Service by mail is complete upon mailing. CR 5.02, Huddleston, 757 S.W.2d at 217. The date on which the motion is received and clocked by the court clerk is not the determinative issue, it is the date on which it is served, in this case it was Friday August 1, 2008 or earlier.

Mr. Steadman's CR 59.05 was timely filed, hence the Court of Appeals dismissal was clearly erroneous. Wherefore, the dismissal of Steadman's Appeal must be vacated and remanded for its due consideration.

II. CR 6.05 AFFORDED MR STEADMAN THREE ADDITIONAL DAYS FOR THE FILING OF HIS CR 59.05 MOTION.

The Court of Appeals cited Arnett v. Kennard, 580 S.W.2d 495 (Ky. 1979) as the basis for dismissing the CR 59.05 as being untimely thus rendering Mr. Steadman's appeal following the CR 60.02 Motion as untimely. The Court of Appeal's reliance on this case is in direct contradiction of its more recent ruling issued in 2009 addressing the same exact issue. (See provided copy of Commonwealth of Kentucky Court of Appeals NO. 2009-CA-000227-ME, TRAVIS JOHN NORMILE APPELLANT v. HONORABLE JASON S. FLEMING, JUDGE ACTION NO. 06-CI-00322 BOBBIE MARIE WILSON, exhibit seven) Although an unpublished opinion, it is clear that there is an uncertainty as to the application of CR 6.05 and the three days afforded due to mailing for a CR 59.05 Motion.

In the unpublished Normile Opinion, the Court of Appeals stated the following:

"Rule 59.05 of the Kentucky Civil Rules of Procedure (CR 59.05) mandates that a motion to alter, amend, or vacate must be *served not* later than ten days after the entry of the final judgment. (Emphasis added). In the instant case, the final amended order was entered on November 7, 2008. Since the copy of the final order was mailed to Normile, three additional days should be added to the time frame allotted in CR 59.05 pursuant to CR 6.05. Thus, Normile's motion had to be served by November 20, 2008."

Either CR 6.05 applies to a CR 59.05 motion or it does not. The recent unpublished Opinion stated that CR 6.05 DOES apply to CR 59.05. The law cannot be vague or ambiguous or selective as to its application. In the recent case addressing CR 6.05 and CR 59.05, the Court of Appeals stated that CR 6.05 had application for a CR 59.05 Motion, however, in Mr. Steadman's case, the Court of Appeals said it does not. In light of the more recent case, although unpublished, the case is directly on point as to this limited narrow issue of CR 6.05's application to CR 59.05 Motions. For this and the above cited reason, Mr. Steadman's CR 59.05 was timely filed. The Court of Appeals dismissal of this portion of his Appeal was erroneous and must be vacated and remanded back for further review by the Court of Appeals.

**APPELLEE'S (STEADMAN'S) RESPONSE TO
APPELLANT'S (COMMONWEALTH'S) BRIEF**

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee/Cross-Appellant requests oral arguments be heard.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

City of Devondale v. Stallings, 795 S.W.2d 954, 957 (Ky. 1990).....7

Nelson County Board of Education v. Forte, 337 S.W.3d 617, 626 (Ky. 2011).....7

Rollins v. Commonwealth, 294 S.W.3d 463 (Ky. App. 2009).....8

transferred to the Court of Appeals. Steadman's case was no longer under the jurisdiction of the trial court but rather was under the jurisdiction of the Court of Appeals. For this reason, the Order of Restitution entered on June 13, 2007, without appropriate jurisdiction of the trial court, is void and the Court of Appeals' decision pertaining to this matter must be affirmed.

II. THE FINAL JUDGMENT SENTENCE OF IMPRISONMENT MADE NO REFERENCE TO RESTITUTION.

The Final Sentence is what it purports be, namely the Final Sentence. In the Final Sentence entered on May 29, 2007, there is no reservation language as to the issue of restitution. In Rollins v. Commonwealth, 294 S.W.3d 463 (Ky. App. 2009), there was an open-ended restitution order, which left “the amount of full restitution to be determined” at a future date. Id. at 464 This “reservation” did not extend jurisdiction to the trial court to later resolve the issue of restitution. . Even more compelling to refute the Commonwealth's assertion is the fact that no such reservation was contained within the written Final Sentence in the case *sub judice*. The trial court entered the Final Sentence on May 29, 2007, it entered the Restitution Order on June 13, 2007. More than ten days had lapsed from May 29, 2007, to June 13, 2007, the trial court lacked any jurisdiction on June 13, 2007.

The trial court made no indication on the written Final Sentence order that it would reserve the issue of restitution. After the expiration of the tenth day, the trial court could not proceed to enter any Orders affecting the Final Sentence as it no longer had jurisdiction. The Commonwealth, one could suppose, could have filed a CR 59.05 to alter, amend or vacate the judgment, which would have extended the trial court's jurisdiction to enter the appropriate and timely modification, but alas it did not. Because the trial court did not have jurisdiction on June 13, 2007, to enter the Restitution Order, the Court of Appeals' Opinion must be affirmed as to the issue pertaining to the restitution.

CONCLUSION

Under both arguments raised by the Appellee, Steadman, it has been unequivocally established that the trial court had no jurisdiction to enter the Restitution Order entered on June 13, 2007. The Court of Appeals properly reached its conclusion and its Opinion affecting the issue of restitution must be affirmed and the Restitution Order entered on June 13, 2007, be vacated.

Respectfully submitted,



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